

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





# 77-1248

To be argued by  
PAMELA ROGERS CHEPIGA

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1248

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UNITED STATES OF AMERICA,

—v.—

EDMUND A. ROSNER,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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### BRIEF FOR THE UNITED STATES OF AMERICA

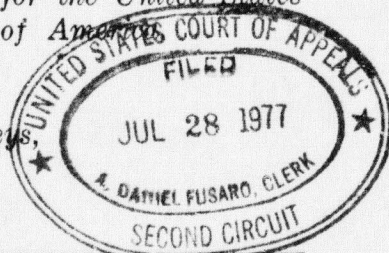
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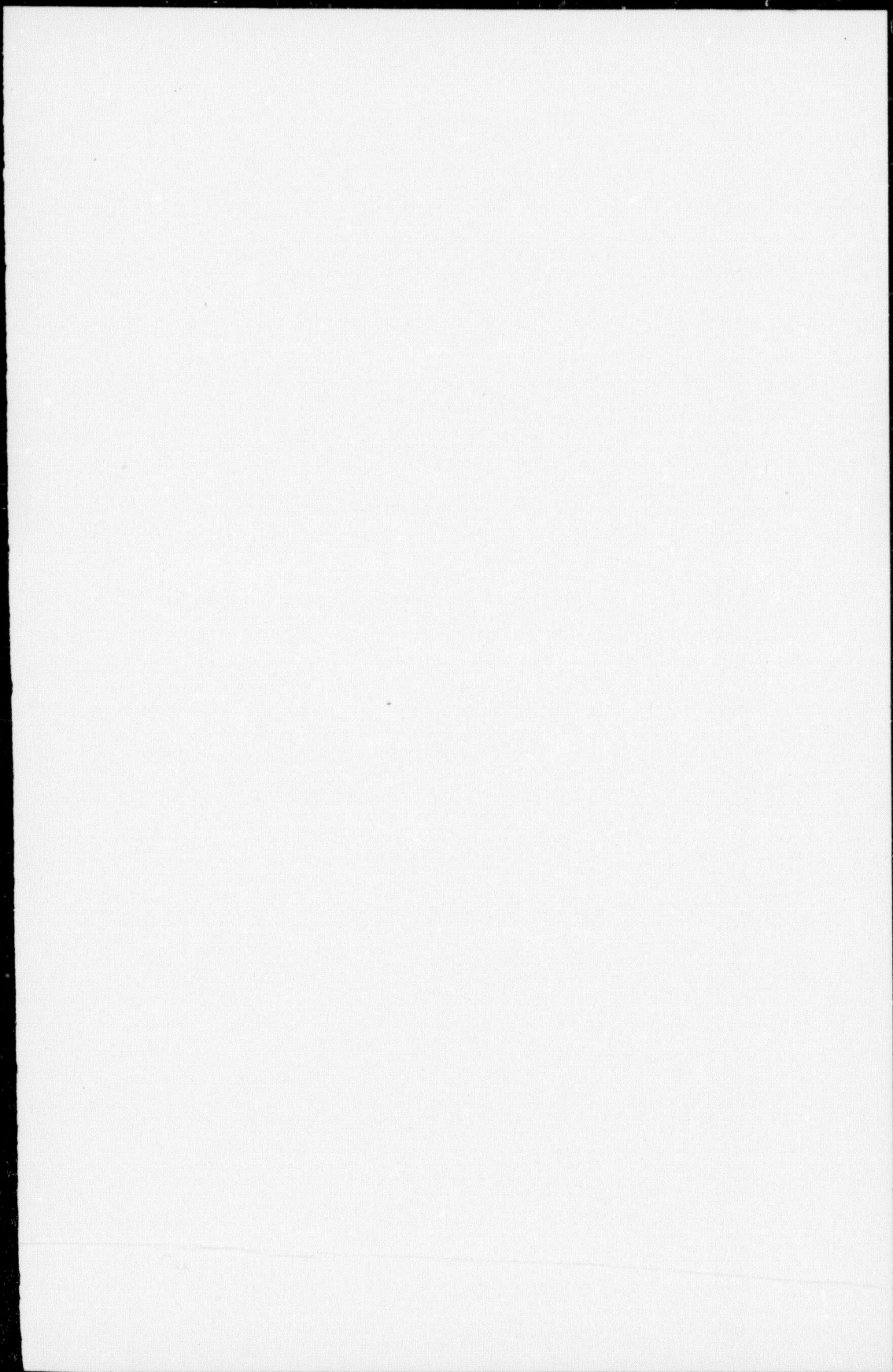
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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 77-1248**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

EDMUND A. ROSNER,

*Defendant-Appellant.*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Edmund A. Rosner appeals from an order entered in the United States District Court for the Southern District of New York on May 11, 1977, by the Honorable Inzer B. Wyatt, United States District Judge, denying Rosner's motion pursuant to Title 28, United States Code, section 2255, to vacate and set aside the judgment of conviction and to grant him a new trial.

On December 5, 1972, after an eleven day trial before the Honorable Arnold Bauman, United States District Judge, and a jury, Rosner was found guilty of conspiracy, obstruction of justice, and three counts of bribery. After hearings on two separate motions for a new trial, Rosner was sentenced on March 20, 1973, to concurrent terms of five years imprisonment. On September 26, 1973, the conviction was affirmed, but the sentence was vacated and the case was remanded for resentencing. *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973). On March 20, 1974, while his petition

for certiorari was pending in the Supreme Court, Rosner moved in the District Court for a new trial based on newly discovered evidence that the principal Government witness against him, Robert Leuci, had lied about the extent of his own prior criminal activities. On June 10, 1974, the Supreme Court denied Rosner's application for a writ of certiorari without prejudice to the District Court's consideration of the motion for a new trial. 417 U.S. 950. Judge Bauman held hearings on the new trial motion in July 1974, and on August 15, 1974, denied the motion in an unreported opinion. On August 16, 1974, Judge Wyatt, to whom the case had been reassigned, imposed concurrent sentences of three years imprisonment on each count. No appeal was ever taken from that sentence. However, Rosner did appeal the denial of his motion for a new trial, which was affirmed in April 1975. *United States v. Rosner*, 516 F.2d 269 (2d Cir. 1975). On June 30, 1976, the Supreme Court denied Rosner's petition for certiorari in connection with the new trial motion. 427 U.S. 911. Rosner moved on August 27, 1976, for a reduction of sentence pursuant to Fed. R. Crim. P. 35. This was denied on September 3. On September 27, 1976, Rosner filed a motion to vacate Judge Wyatt's sentence. Judge Wyatt denied this motion on October 1 as "utterly lacking in merit." On November 29, 1976, the Supreme Court denied Rosner's petition for rehearing of the denial of his petition for certiorari. 97 S. Ct. 513.

This Court, on February 1, 1977, affirmed Judge Wyatt's denial of the motion to vacate the sentence. *United States v. Rosner*, 549 F.2d 259 (2d Cir. 1977). A petition for rehearing and suggestion for rehearing *en banc* was denied on April 22, 1977; a petition for a writ of certiorari was filed by Rosner on May 23, 1977, and is still pending.

By notice of motion dated May 3, 1977, Rosner filed the present motion for a new trial. Simultaneously, by means of an order to show cause signed by the Honorable



Whitman Knapp on May 4, 1977, Rosner sought to continue his surrender on this conviction, initially scheduled for May 9, 1977, pending disposition of the new trial motion. On May 6, 1977, Judge Wyatt denied that relief. On the same day, Rosner moved for an order disqualifying Judge Wyatt from considering the new trial motion. This motion was denied on May 11, 1977, with an accompanying memorandum opinion, and on the same day, after hearing oral argument, Judge Wyatt denied the new trial motion as well. On May 16, almost four and one-half years after his conviction, Rosner surrendered to custody.

### Statement of Facts

In his moving papers, Rosner presented three different grounds in support of his new trial motion.\* First, he submitted two affidavits, dated July 15 and 21, 1976, by jurors who sat in the *Rosner* trial in December 1972. These affidavits were the product of the jurors' *ex parte* solicitation by Rosner's lawyers and purport to state that those jurors would have voted differently in the trial if they had known certain information. As his second basis for relief, Rosner presented a recent *New York Magazine* article that, he contended, demonstrates that Nicholas Scoppetta—a former counsel to the Knapp Commission, a former Assistant United States Attorney and presently Deputy Mayor—was aware of prior crimes committed by Robert Leuci that Leuci perjurally denied during trial. Third, Rosner offered an affidavit by Paul Goldberger, Esq., filed apparently at the behest of Rosner's attorneys, relating certain events occurring in 1977 at the trial of one Leslie Wolff. The affidavit summarizes various opinions concerning the credibility of Leuci at the *Wolff* trial.\*\*

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\* As a technical matter, the motion was solely under Title 28, United States Code, Section 2255, since a motion under F.R. Crim. P. 33 would be untimely.

\*\* The probative force—and indeed the relevance—of the Goldberger affidavit was never made clear in the District Court. Rosner has on appeal wisely abandoned any reliance on it.

Judge Wyatt, after extensive oral argument, denied the motion for a new trial in open court. In a short oral decision, Judge Wyatt indicated that the jurors' affidavits were inadmissible under Rule 606(b) of the Federal Rules of Evidence, and that the *New York Magazine* article did not raise any grounds for a new trial.

## **ARGUMENT**

### **The Motion for a New Trial Was Properly Denied Without a Hearing.**

#### **A. Background and synopsis of argument.**

Both during the trial and the first round of new trial motions filed by Rosner shortly thereafter, the principal focus of the defense was on the credibility of the witness Robert Leuci. As this Court knows from its



earlier opinion, *United States v. Rosner, supra*, 516 F.2d at 270, Leuci, during trial, falsely denied his criminal involvement in any activities other than certain minor matters he admitted on direct examination. In early 1974, the office of the United States Attorney learned for the first time that in fact Leuci had, while acting as a New York City Police Officer and well before his involvement in the *Rosner* case, committed several serious criminal acts, including the acceptance of bribes and extortion. This new information was immediately made known to Rosner, and there followed in July 1974 an unusually lengthy hearing on Rosner's new trial motion. One principal focus of this hearing, which involved numerous witnesses and consumed several days of court time, was on the precise chronology of when anyone connected with the Government first learned of Leuci's criminal activities and perjurious denial of such activities at the trial. Included among the witnesses at the trial were Robert Leuci and Nicholas Scoppetta. Each of them testified, in some detail, about initial conversations between them in

the early months of 1971, at which Leuci agreed to act in an undercover capacity. They each testified, and Judge Bauman subsequently found in a careful, unreported opinion denying the new trial motion,\* that in those early conversations Leuci admitted to Scoppetta only the relatively minor infractions later admitted at trial.\*\* Indeed, Judge Bauman found that no one connected with the Government, other than Leuci himself, was aware of the perjurious nature of his description at trial of his own criminal past.\*\*\*

On appeal, Rosner did not even challenge Judge Bauman's finding that no Government agent was contemporaneously aware of Leuci's perjury. Rather, the principal contention was that the fact of Leuci's perjury itself required a new trial. Noting that Rosner had in his own testimony admitted his participation in the acts charged but simply claimed entrapment, and also noting the extraordinarily incriminating nature of the tape

recordings admitted against Rosner (Judge Bauman noted, "Leuci was not the lynchpin of the government's case; the tapes were." Opinion of August 15, 1974, at 12), this Court affirmed Judge Bauman's ruling that Leuci's perjury did not require a new trial. 516 F.2d at 278.

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\* This opinion was included in Rosner's papers in this motion, which in turn are included in the record on appeal.

\*\* The relevant portions of Scoppetta's and Leuci's testimony are included in the record on appeal as an exhibit to the affidavit of Frederick T. Davis, dated May 5, 1977.

\*\*\* No evidence at that hearing tended to show that Leuci lied about anything other than his *own* criminal activities. As Judge Bauman noted in his opinion, "The evidence newly discovered here, regardless of its extent, only serves to impeach Leuci's credibility. It does not address the question of the defendant's guilt or innocence." Opinion of August 15, 1974, at 77. Indeed, to this day Rosner's new trial claims are based solely upon attacks on Leuci's credibility, not upon a claim of discovery of any evidence tending to show that Rosner was not in fact guilty.

In his fifth new trial motion,\* Rosner returns to the precise points that were fully, indeed exhaustively,

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\* The new trial motion upon which hearings were held in July 1974 was the third. In August 1976, the fourth motion was filed. It was based upon the juror's affidavits that are the focus of Point I of the present appeal and a claim that the Supreme Court's then-recent decision in *United States v. Agurs*, 427 U.S. 97 (1976), somehow changed the law in the area of new trial motions. This fourth motion was withdrawn one week after it was filed.

The timing of the fourth new trial motion is itself illuminating in demonstrating Rosner's lack of good faith in pursuing his post-trial claims. The motion, which, as noted, contained virtually the identical claims now before this Court, was filed on August 27, 1976. On September 3, 1976, Rosner's attorney moved before Judge Wyatt to withdraw the motion. As reasons therefor, Rosner's attorney gave the following:

"The Court: Why do you want to withdraw it, if I may ask?

Mr. Taikeff: Because in a way that matter is presently before the Supreme Court, and Mr. Dershowitz [another Rosner attorney] thought that now that there has to be one more step in the Supreme Court in connection with that general subject matter, it might be wiser, so this morning I was instructed to withdraw it." (Tr. 9/3/76 at 16).

This explanation, of course, was pure bogus. The matter "presently before the Supreme Court" at that time was Rosner's petition for rehearing from the denial of his petition for a writ of certiorari in his earlier appeal from Judge Bauman's denial of his new trial motion. That petition for rehearing was filed on July 26, 1976, one month *before* the fourth new trial motion was even filed. If Rosner's real concern had been to avoid having parallel claims heard simultaneously, he would not have filed the new trial motion. The real reason for its filing, of course, was that Rosner was running out of grounds upon which to remain free on bail; the real reason for its withdrawal was the fact that on August 31, 1976, between the filing of the fourth new trial motion and its withdrawal, a panel of this Court took the relatively unusual step of granting Rosner a continued stay pending the Supreme Court's resolution of his petition for rehear-

[Footnote continued on following page]



litigated in 1974. In order to buttress his persistent claim that Leuci's perjury somehow affected the jury's 1972 verdict, Rosner now points to two jurors' affidavits, sworn to more than three and one-half years after the trial, in which they purport to claim that they would not have voted to convict Rosner if they had known the full extent of Leuci's misdeeds, and to a recent piece of sensational journalism that, Rosner claims, sheds new light on the precise issue already examined at length during the 1974 hearing.

The Government's response to these two claims is simple: the jurors' affidavits are simply incompetent, and at any rate do not entitle Rosner to a new trial; the magazine article upon which Rosner now stakes his claim simply does not support him.

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ing, and the new trial motion was thus not necessary for the sole reason Rosner filed it.

At the time of the withdrawal, the Assistant United States Attorney presciently observed:

"It is our fear here, Judge, that once the re-argument before the Supreme Court and the rehearing for the granting of certiorari are denied before the Supreme Court, the motion will then be filed before your Honor, and then we will have another request for a stay."

(Tr. 9/3/76, at p. 16). That, of course, is precisely what occurred. Prior to the Supreme Court's ultimate denial of Rosner's petition for rehearing on November 29, 1976, 97 S. Ct. 513, he had raised the claim that his second sentence by Judge Wyatt was illegal, and then became independently enlarged on bail on that claim pending its disposition in this Court. After the affirmance of Judge Wyatt's denial of his sentence claim on February 1, 1977, 549 F.2d 259, Rosner continued free on bail pending his petition for rehearing and suggestion for rehearing en banc. This petition was denied on April 22, 1977. Then, and only then, did Rosner trot out the jurors' affidavits that had previously been the principal portion of his fourth new trial motion, and simultaneously ask for bail on that claim.

In short, the chronology of Rosner's manipulation of his new trial motions reveal them for what they are: hollow attempts to forestall his well-deserved incarceration.

## B. The jurors' affidavits were not admissible.

Rule 606(b) of the Federal Rules of Evidence\* states in the most unambiguous terms that a juror "may not testify" about "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict. . . ." It also provides that no affidavit may be received by him "concerning a matter about which he would be precluded from testifying. . . ." The sole exception is that a juror may testify on "the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The dichotomy created by the Rule is clear: juror testimony concerning the content of the trial itself or of deliberations is simply not receivable in court; \*\* only testimony relating to *outside* influences may be the subject of inquiry.\*\*\*

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\* Rosner does not even reproduce the wording of the rule that is dispositive of his claim, see F.R. App. 28(f). Rule 606(b) provides:

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

\*\* The title of Rule 606 refers to the "competency" of the juror as a witness.

\*\*\* That this exception was intended to be strictly limited to the impact on the jury of improper outside influences, such as

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The jurors' affidavits procured by Rosner obviously fall within the general proscription of Rule 606(b) and not the extremely limited exception. They simply do not relate to any "irregularity" in the December 1972 deliberations, but rather to the jurors' subjective reaction to the testimony at trial. Indeed, Rosner's claim in identical language in the District Court and in his brief on appeal that "it is clear that the jurors would be testifying in relation to the occurrence of an outside prejudicial event, Leuci's perjury and the government's suppression, which resulted in a violation of the defendant's Fifth and Sixth Amendment rights," Brief at 8, is utterly fatuous. This conclusion surely follows *a fortiori* from this Court's decision in *United States v. Green*, 523 F.2d 229, 235 (2d Cir. 1975), *cert. denied*, 428 U.S. 1074 (1976). In *Green*, the trial judge informed the jury that a certain day would be their last in court and that they could make other plans for the following day. In fact, the case only went to the jury at noon of that day, and the jury returned a verdict of guilty at almost 10:00 P.M. of the same day. After trial, the defendant submitted an affidavit of a juror indicating that the jury had been coerced by the time deadline set by the court. This Court held that the affidavits could not be considered, in language dispositive of this case:

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a bribe, illicit communication, or an unauthorized view, is clear from the legislative history. The Advisory Committee's Note stated that the exception applied only to "irregularity" in the deliberation, and was intended to allow inquiry into "influences injected into or brought to bear upon the deliberative process." The Judiciary Committee of the House recommended an amendment that would have permitted inquiry into the conduct of the deliberations (as opposed to the mental processes of the jurors). H. Rep. No. 93-650 (Nov. 15, 1973), pp. 9-10. This amendment was rejected by the Senate-House Conference, H. Rep. No. 93-1597, Cong. Rec. H. 11930 (Daily Ed. Dec. 14, 1974), which noted that the exception as ultimately written applies only to demonstrate the existence of "any outside influences" and "misconduct."



The federal courts have rejected the iron-clad rule that a jury will never be heard to impeach its own verdict. [Citations omitted] However, while the courts have accepted the testimony of jurors to establish that impermissible outside influences were brought to bear on a jury, [citations omitted] they have consistently refused to consider statements by jurors relating either to the subjective effect such influences might have had on them or to the mental processes through which they arrived at their verdict. [Citations omitted] This court on a number of occasions has stressed that the strong public interest in the integrity of jury verdicts and the protection of jurors from harassment requires that investigation into the subjective motivations and mental processes of jurors not be permitted.

If the District Court in *Green* properly avoided reliance on the jurors' affidavits in that case, Judge Wyatt was particularly entitled to do so in this case. Not only is this case governed by the recently-effective Rules of Evidence, which reiterate in the most explicit terms the distinction set forth in *Green*, but the fact about which the defendant sought information in *Green*—that is, whether or not the jurors were coerced—is considerably closer to being an "outside influence" than was Rosner's inquiry in this case, which related solely to the jurors' wholly subjective assessment of Leuci's credibility.

Indeed, even if one were to follow Rosner's example and treat the issue solely as being based upon pre-Rules of Evidence law, Rosner is clearly entitled to no relief. The rule against impeaching a verdict originates in Lord Mansfield's statement that a witness "shall not be heard to allege his own turpitude." *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). It has evolved, however, to further policies that protect in some measure the



finality of verdicts, insulate jury deliberations, and deter tampering and post-verdict harassment of jurors by a defeated party. See *McDonald v. Pless*, 238 U.S. 264 (1915); *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied sub nom. Meredith v. United States*, 368 U.S. 984 (1962); see also 3 WEINSTEIN ON EVIDENCE § 606 [03] p. 24.

The practice in the federal courts, at least since 1892, has been to distinguish between evidence of extraneous influences on the jurors and evidence of the jurors' thought processes; the former is generally permitted, but the latter is in all cases barred.\* See *Mattox v. United States*, 146 U.S. 140 (1892). This liberalizes Mansfield's absolute bar by allowing testimony as to irregularities, but not as to their effects. 3 WEINSTEIN ¶ 606 [04] pp. 31-34. This distinction, which has been strictly followed by the Courts of Appeals, see *United States v. Green*, *supra*, 523 F.2d at 235; *United States v. Howard*, 506 F.2d 865, 868 (5th Cir. 1975); *Downey v. Peyton*, 451 F.2d 236 (4th Cir. 1971), underlies the structure and wording of Rule 606(b).\*\*

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\* *Parker v. Gladden*, 385 U.S. 363 (1966), does not erode the federal rule. There, the juror's statement, which was considered, was elicited and considered by the trial court itself. The court did not need to rely on the statement since the bailiff's conduct was highly prejudicial. *United States v. Miller*, 403 F.2d 77, 83 n. 11 (2d Cir. 1968).

\*\* Rosner cites *United States v. Howard*, *supra*, for the proposition that a juror may testify to the occurrence of an outside prejudicial event which bore upon his verdict. In *Howard*, extrinsic facts—that the defendant had been in trouble before—were introduced by a juror into the jury room. In vacating and remanding for further proceedings, the Court was influenced by the clear violation of the principle that conclusions be reached only by evidence and argument in open court. It directed the district court on remand, however, to determine only the *objective* allegations in the affidavits, and to disregard those portions “pur-

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Finally, and in addition to the legal issue of the affidavits' competence, they simply provided no basis for granting the relief Rosner seeks. As an ultimate matter, of course, the affidavits could prove nothing, since the impact of evidence is to be gauged "on the basis of the nature of the matter and its probable effect on a hypothetical average jury." *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied sub nom. Meredith v. United States*, 368 U.S. 984 (1962), rather than subjective conclusions of actual jurors. Further, the affidavits were made by the jurors following an *ex parte* confrontation with Rosner's attorneys more than three and one-half years after the trial.\* Quite apart from the impropriety of juror interviews in the circumstances of this case,\*\*

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porting to reveal the influence the alleged prejudicial extrinsic matter had upon the jurors, and...to avoid examination concerning any other aspect of the jurors' mental processes." 506 F.2d at 869. See also *Downey v. Peyton*, *supra*; *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

\* As with other aspects of the delay in making the most recent new trial motions, the delay in procuring the jurors' affidavits was apparently the choice of Rosner. Judge Bauman denied the new trial motion based upon Leuci's perjury on August 15, 1974. Rosner thus waited almost two years before seeking the affidavits that he now claims refutes Judge Bauman's analysis. No credible explanation for this delay appears in the record.

\*\* In its answering papers filed in the District Court in this motion, the Government in strong language castigated the conduct of Rosner's attorneys in seeking the interviews. Affidavit of Frederick T. Davis, dated May 5, 1977, at ¶ 7-8. The facts underlying that view were these:

Prior to Judge Bauman's decision on the new trial motion, Rosner had sought permission to interview jurors; the Government opposed this initiative and sought an order prohibiting Rosner from doing so. In the final footnote of his August 15, 1974, opinion, Judge Bauman indicated that both issues were moot. He also stated that such an inquiry was merely "another imaginative effort to frustrate the purpose of all trials—to find the truth." Undeterred, and after allowing the jurors' recollection

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it is simply inconceivable that two jurors would be able to provide a meaningful account of how they viewed the credibility of a witness and how, three and one-half years later, that assessment would be affected by new information. Indeed, Judge Bauman explicitly indicated, at a time when the trial was only 19 months old, that interviewing jurors at that late date "can have no useful result." Opinion dated 8/15/74, at n. 19. In short, even assuming, quite contrary to law, the full admissibility and competence of the affidavits, they simply do not establish what Rosner asserts.

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tions to dim almost another two years, Rosner sought the jurors' interviews without any prior permission from the Court whatsoever. It was this behavior, particularly in the face of Judge Bauman's views and with knowledge that any such initiative was opposed by the Government, that we labeled reprehensible.

At the hearing on Rosner's order to show cause held on May 6, 1977, Mr. Rosner's attorney engaged in a lengthy self-justification of the tactic. Tr. 5/6/77 at 16-18. The gist of that justification was that Rosner's attorneys consulted bar associations and "various legal experts," *id.* at 18, who opined that interviewing jurors was proper; thus armed, they determined to do so. This argument simply misses the point. As this Court has expressly held, the decision whether or not to interview jurors is simply not to be made unilaterally, no matter who the attorney is or how many "legal experts" he consults. Rather, "post trial questioning of jurors must only be conducted under the *strict supervision and control of the court*, with inquiry restricted to those matters found *by the court* as both relevant and proper." *United States v. Brasco*, 516 F.2d 816, 819 n.4 (2d Cir), *cert. denied*, 423 U.S. 860 (1970) (emphasis added), citing with explicit approval, *United States v. Brasco*, 385 F. Supp. 966, 970 n.5 (S.D.N.Y. 1974); see also *United States v. Sanchez*, 380 F. Supp. 1260, 1265 (N.D. Tex. 1973) (practice of interviewing jurors without prior judicial approval is "disgusting"). Particularly since both the District Court and Court of Appeals opinions in *Brasco* were published more than a year prior to the interviews, and since the trial judge had already indicated that such interview were clearly not "relevant and proper," there was simply no excuse for Rosner's conduct.



**C. The New York Magazine article provides no basis for a new trial.**

As his final claim, Rosner asserts that an article about Leuci published in a recent issue of the *New York Magazine* provides information that Nicholas Scoppetta, an Assistant United States Attorney during the *Rosner* trial and now a Deputy Mayor of the City of New York, was aware of the true extent of Leuci's misbehavior during the *Rosner* trial. This contention is wholly without merit for two reasons.

First, the issue of when anyone connected with the Government first became aware of the true extent of Leuci's misdeeds was the focus of much of the new trial hearing held before Judge Bauman in July 1974. Both Mr. Scoppetta and Leuci testified, at some length, about their initial conversations in 1971, at which time Leuci admitted to Scoppetta only the relatively minor infractions that he also admitted on direct examination at the *Rosner* trial.\* In his careful opinion, Judge Bauman expressly found that neither Scoppetta nor any other prosecutor had any knowledge of Leuci's actual criminal involvement prior to his confession of them in April 1974, opinion at 15, 16, and this Court on appeal repeated that "appellant does not claim that the government actually knew before trial of the extent of Leuci's activities." 516 F.2d at 271. Thus, Rosner now asks this Court to mandate an inquiry into facts already examined in depth and conclusively determined by the District Court and this Court.\*\*

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\* The relevant portions of that transcript are included as an exhibit in the affidavit of Frederick T. Davis, dated May 5, 1977.

\*\* In addition, as the Government established in its answering affidavit on this motion, both Scoppetta and Leuci testified yet another time in the January 1977 trial against Leslie Wolff, only

[Footnote continued on following page]



Second, and more importantly, Rosner ignores the total ambiguity of the Daly article in *New York Magazine*. The only explicit statement appearing in the article that is relevant to this case is that at the February 1971 meeting between Scoppetta and Leuci, Leuci "admitted to no misdeeds for which he can be prosecuted." (A. 51).<sup>\*</sup> Further, at A. 53-54, the article relates the fact that Leuci *first* admitted the full scope of his misdeeds in 1974—which is, of course, precisely what the hearing before Judge Bauman in 1974 established. Indeed, quite contrary to Rosner's strained interpretation of the article, absolutely nothing in it states or even implies that Leuci did, in fact, confess the full extent of his misdeeds to Scoppetta. At most, Mr. Daly's rendition of the Leuci-Scoppetta conversation appearing at A. 50-51 of the article refers either to Leuci's unnamed partner, or to narcotics detectives generally. The latter interpretation is consistent not only with the rhetorical question that introduces this section ("Do you know what it's like to be a narcotics detective?") but with the fact that in this portion of the reconstructed conversation Leuci was attempting to persuade Scoppetta that corrupt judges, prosecutors and defense counsel were more appropriate, *as a class*, to investigate than corrupt police officers, *as a class*. Indeed, a complete *mea culpa* of the sort Rosner asserts occurred would have made absolutely no sense in the factual and historical context of the situation.

In short, the magazine article is wholly consistent with the facts painstakingly demonstrated in lengthy proceedings before the District Court, this Court, and other courts.

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days before the publication of the Daly article. In the course of that testimony, they detailed again the full extent of their February 1971 conversation. The relevant pages of their testimony are included as an exhibit in the affidavit of Frederick T. Davis, dated May 10, 1977.

<sup>\*</sup> References refer to Appellant's Appendix.

Rosner's boldfaced attempt to achieve a new trial almost five years after his conviction based upon this extraordinarily slender reed flies in the face of this Court's admonition that new trial motions are "not favored and should be granted only with great caution," *United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958), and should be rejected.

### CONCLUSION

**The order of the District Court should be affirmed.**

Respectfully submitted,

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

PAMELA ROGERS CHEPIGA,  
FREDERICK T. DAVIS,  
*Assistant United States Attorneys,  
Of Counsel.*





AFFIDAVIT OF MAILING

STATE OF NEW YORK )

COUNTY OF NEW YORK )

ss.:

*PAMELA ROGERS CHERIGA* being duly sworn deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the *28th* day of *July*, *1977*  
she served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

*J. JEFFREY WEISENFELD, ESQ.*  
*401 BROADWAY*  
*NEW YORK, NEW YORK*

And deponent further says that she sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

*Pamela Rogers Chery*

Sworn to before me this

*28th* day of *July*, *1977*

*Olga C. Grampp*

OLGA C. GRAMPP  
Notary Public New York State  
No. 43-4620338  
Qualified in Richmond Cty.  
Comm. Expires March 30, 1979

